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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1969

No. 359

ELIZABETH M. BANAKUS, as Administratrix of the Estate of ANTHONY J. BANAKUS, deceased,

and,

DANIEL DONNELLY, as Administrator C.T.A. of the Estate of WILLIAM J. GARIN, deceased,

Plaintiffs,

*and*

YACHIM G. HOLOCHUCK,

Petitioner,

*against*

UNITED AIRCRAFT CORP.,

Respondent.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on April 24, 1969.

## Citations to Opinions Below

The opinions of the United States District Court for the Southern District of New York, printed in Appendix B hereto, *infra,* have not as yet been reported. The United States Court of Appeals for the Second Circuit affirmed the decision of the district court, without opinion, on April 24, 1969.

## Jurisdiction

The judgment of the United States Court of Appeals was entered on April 24, 1969. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

## Question Presented

Where an action is pending arising out of a single accident, brought on behalf of three plaintiffs, and, unknown to counsel, one of the three had died within minutes before the action was commenced, should a federal court, consistent with substantial justice and liberal amendment of pleadings, permit amendment and the substitution of said plaintiff's administratrix as party-plaintiff.

## Statute Involved

The statutory provisions involved are: Federal Rules of Civil Procedure 1, 15 (a) and 25 (a).

## Statement

The jurisdiction of the district court was invoked under 28 U.S.C. § 1332: petitioner was a citizen of Massachusetts and respondent is a Delaware corporation with its principal place of business in Connecticut.

On January 8, 1966, a United States Air Force C-119C aircraft crashed in the vicinity of Maplewood, Pennsylvania. It was equipped with a propeller which plaintiffs allege was negligently designed, manufactured, repaired and serviced by respondent.

The crash, caused by the malfunction of said propeller, killed Anthony J. Banakus and William J. Garin. Yachim G. Holochuck, a member of the crew, in an attempt to save his life, parachuted from said aircraft, but was severely injured during the parachute descent. On January 4, 1968, an action was commenced in the United States District Court for the Southern District of New York for the wrongful deaths of Banakus and Garin and Holochuck's personal injuries. That same day, unknown to counsel, Holochuck died.

Petitioner thereafter moved to amend the complaint to substitute Stella Holochuck, administratrix of his estate, as party-plaintiff and to add a claim for wrongful death. Respondent cross-moved for summary judgment, asserting that since Holochuck died before his complaint was filed his action was a nullity.

An initial issue was raised as to which came first—the filing or death, with some doubt existing because the Clerk of the Southern District does not time stamp complaints as they are filed.*

Petitioner claimed that even if Holochuck's death preceded the filing of his complaint the essential elements of notice were fulfilled and the court, in the exercise of the liberal amendment policies of the Federal Rules, should

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* The district court found, on the basis of affidavits that Holochuck died at approximately 12:15 P.M., and his complaint was filed some time after 12:50 P.M. on January 4, 1968 (Appendix B, at 12). For the purposes of this petition, petitioner will assume that finding to have been correct, although it was vigorously disputed below.

have permitted the amendment and thereby saved the action.

The district court denied petitioner's motion to amend and granted respondent's motion for summary judgment, dismissing the complaint. The Court of Appeals unanimously affirmed said judgment, without opinion, on April 24, 1969.

## Reasons for Granting Writ

The courts below, in refusing to permit amendment of Holochuck's complaint enforced a rigid and conceptual notion of pleading which is repugnant to the liberal spirit of the Federal Rules. One action was started with three plaintiffs alleging identical conduct. Because one of the plaintiffs had died minutes before the filing of the complaint the courts below granted judgment for the defendant as to that plaintiff and refused leave to his widow-administratrix to be substituted for him. The writ must be granted because administration of the Federal courts demands it.

The motion to amend the complaint was made under Rule 15(a) of the Federal Rules of Civil Procedure, which states in part that:

> "[A] party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires."

The motion for substitution was made pursuant to Rule 25(a) of the Federal Rules of Civil Procedure which provides as follows:

> "(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party. . . ."

Under the laws of any of the states whose laws may govern this action, the claim for petitioner's personal injuries was not extinguished by his death. Mass. G. L. Ch. 228 § 1 (domicile of petitioner); N. Y. E.P.T.L. § 11-3.2 (forum); 20 Pa. Stats. § 320.601 (situs of the accident). The survival of this claim exists notwithstanding any statute of limitations, which would not extinguish the right but would merely affect the remedy for its enforcement. Thus, under Rule 25(a), Mrs. Holochuck should be substituted as plaintiff and under Rule 15(a) the amendment should be allowed.

This Court has stated that under the Federal Rules, justice controls and that artificial concepts of pleading must be rejected: in short, all that is required is a generalized summary of the action which affords fair notice. *Conley* v. *Gibson*, 335 U. S. 41 (1957); *accord, United States* v. *Hougham*, 364 U. S. 310 (1960). This Court has accepted "the principle that the purpose of pleading is to facilitate a proper decision on the merits." 335 U. S. at 48. The prime, indeed, only requirement of consequence, is *notice* of the asserted claim. *E.g., United States* v. *Building and Construction Trades Council*, 271 F. Supp. 447 (E. D. Mo. 1966); *Bellmore Sales Corp.* v. *Winfield Drug Stores, Inc.*, 187 F. Supp. 161 (S.D.N.Y. 1960).

Under these liberal concepts of notice pleading it is perfectly clear that the fact that Holochuck died minutes before the complaint was filed (a fact that, as previously indicated, is contested by peititioner) is too insubstantial to support dismissal of his claim. The defendant was given notice, whether he died minutes before or minutes after the filing. Justice-wise nothing should turn on the momentary time of death.

The district court based its decision on several cases where death had occurred months before the action was started. *Brooks* v. *Boston & N. St. Ry.*, 211 Mass. 277, 97 N. E. 760 (1916); *Banks* v. *Employers Liability Assurance*

*Corp.*, 4 F.R.D. 179 (W. D. Mo. 1944); *MacAffer* v. *Boston & M. R.R.*, 268 N. Y. 400 (1935). There are policy reasons why actions should not be sustained when they are started by people long-since dead. But in the instant case we are dealing with *minutes*, a coincidence in time not known to the lawyers duly designated to start the action by the plaintiff, and not discovered by them until long after the death.

In *Norton* v. *Steinfeld*, 36 Ariz. 536, 288 P. 3 (1930), a corporation brought suit for an alleged breach of guarantee. The defendant asserted that when suit was commenced the corporation had been dissolved, and, therefore, could not bring suit. The lower court, however, permitted the corporation's shareholders to be substituted as parties-plaintiffs. The Arizona Supreme Court affirmed.

The court in *Norton* observed that upon dissolution, the assets of a corporation, including its causes of action, pass to its shareholders. 288 P. at 6. Similarly, in the case at bar, petitioner's cause of action passed to his administratrix upon his death.

The court in *Norton* also noted that the cause of action upon substitution, remained the same. Herein, the claim for the petitioner's personal injuries also remains the same upon substitution. While an additional claim for wrongful death is sought to be included by amendment, it arises out of the same occurrence. Respondent had fair and adequate notice of the occurrence when the original complaint was filed. Indeed the wrongful deaths of two others were alleged in the same complaint. Thus, the amendment could not be said to take respondent by surprise.

The "modern and reasonable rule" (*Id.* at 7) of amendment and substitution spoken of by the *Norton* court requires reversal of the decisions appealed from. To do otherwise would be putting form over substance and avoid giving "just" construction to the Federal Rules of Civil Procedure.

## Conclusion

This Court should grant this petition for a writ of certiorari and summarily reverse the decisions of the courts below, making it clear that the administration of justice will not turn on accidents of timing and artificial considerations that lack substance.

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

LEE S. KREINDLER,
RICHARD M. ZAROFF,
Counsel for Petitioner.

## APPENDIX A

### Statutes Involved

F.R.C.P. 1:

> These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

F.R.C.P. 15(a):

> A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. . . .

F.R.C.P. 25(a):

> (1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party. . . .

## APPENDIX B

### UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fourth day of April one thousand nine hundred and sixty-nine.

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Present: HON. J. EDWARD LUMBARD,
Chief Judge,
HON. ROBERT P. ANDERSON,
Circuit Judge,
HON. INZER B. WYATT,
District Judge.

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Elizabeth M. Banakus, as Administratrix of the Estate of Anthony J. Banakus, deceased, and Daniel Donnelly, as Administrator C.T.A. of the Estate of William J. Garin, deceased, and Yachim G. Holochuck,

Plaintiffs-Appellants,

v.

United Aircraft Corp.,

Defendant-Appellee.

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Appeal from the United States District Court for the Southern District of New York.

*Appendix B*

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the appellants.

A. DANIEL FUSARO
Clerk

*Appendix B*

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

Appearances:

Kreindler & Kreindler, 99 Park Avenue, New York, N. Y. 10016, Attorneys for Plaintiffs.

Mendes & Mount, 27 William Street, New York, N. Y. 10005, Attorneys for Defendant.

MANSFIELD, D. J.:

In this diversity suit for personal injuries arising out of an airplane crash which occurred in January 1966 in Pennsylvania, suit was commenced on January 4, 1968, on behalf of Yachim G. Holochuck, a Massachusetts resident, claiming damages for personal injuries suffered as a result of defendant's alleged negligence and breach of warranty. On the day when the action was commenced Holochuck, unbeknownst to his counsel died. On May 16, 1968 his counsel moved, pursuant to Rule 15, F.R.C.P., for an amendment of the complaint to claim wrongful death and conscious pain and suffering as a result of the crash and on July 2, 1968, Stella Holochuck, administratrix of his estate, moved pursuant to Rule 25(a), F.R.C.P., for substitution as plaintiff in place of the deceased. Defendant opposed these motions and cross-moved pursuant to Rule 56 for summary judgment on the ground that since Holochuck had predeceased the filing of the complaint on his behalf for personal injuries, no valid action had been commenced.

*Appendix B*

Since the papers presented an issue which would normally be within the knowledge of plaintiff's counsel and the administratrix, see *Subin* v. *Goldsmith,* 224 F. 2d 753 at 760 (2d Cir. 1955), permission was given pursuant to Rule 56(f) to furnish affidavits as to the precise time of Holochuck's death and the filing of the complaint purportedly for personal injuries. The proof furnished accordingly by the parties establishes that Holochuck died prior to the commencement of the suit on his behalf for personal injuries. His wife, administratrix of his estate, who was with him at the time of his death, states that he died at approximately 12:15 P. M. on January 4, 1968. The complaint was not filed until sometime in the afternoon of January 4, after 12:50 P. M. when an action immediately preceding the suit on his behalf was instituted in this Court.

Since Holochuck was dead when the action for personal injuries was commenced, that action must be treated as a nullity and it cannot be given life by substituting parties and amending the complaint. An action cannot be brought by a deceased. 2 Barron & Holtzoff, *Federal Practice and Procedure* (1961 ed.), p. 27; *Banks* v. *Employers Liability Assur. Corporation,* 4 F. R. D. 179 (W. D. Mo. 1944); *MacAffer* v. *Boston & Maine Railroad,* 268 N. Y. 400 (1935). The action being void at its inception, there were no claims capable of amendment. Nor can the suit, which was for personal injuries, be treated as if it had been instituted validly on behalf of the deceased for conscious pain and suffering and wrongful death. Under Rule 17(b) the capacity of an individual to sue is determined by the law of his domicile, in this case Massachusetts, which does not permit an action to be brought in the name of a decedent. *Brooks* v. *Boston & N. St. Ry. Co.,* 211 Mass. 277, 97 N. E. 760 (1912).

*Appendix B*

Accordingly, the motions to amend the complaint and substitute Holochuck's administratrix as plaintiff must be denied and defendant's motion for summary judgment granted without prejudice to the administratrix' right, pursuant to Rule 17(a), to institute a wrongful death action, which would in all probability be consolidated with the actions instituted on behalf of the other victims of the airplane crash.

So ordered.

s/ WALTER R. MANSFIELD
*U. S. D. J.*

Dated: September 23, 1968.

*Appendix B*

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE]

Appearances:

Kreindler & Kreindler, Attorneys for Plaintiffs, 99 Park Avenue, New York, N. Y. 10016.

Mendes & Mount, Attorneys for Defendant, 27 William Street, New York, N. Y. 10005.

MANSFIELD, D. J.:

On September 23, 1968 the Court denied motions to amend the complaint in this action and to substitute Stella Holochuck, administratrix of the estate of her deceased husband Yachim G. Holochuck, as a plaintiff in place of her deceased husband. These motions were the first indication to defendant that Yachim Holochuck might not have been alive when the action was instituted in his name. As a result defendant, who had not questioned Yachim Holochuck's capacity to sue in his answer, cross-moved for summary judgment on the ground that at the time the suit was instituted Holochuck's claim was not brought by an existent plaintiff.

Defendant's objection being timely and in the nature of an attack on the Court's jurisdiction, see *Pasos* v. *Eastern S. S. Co.*, 9 F. R. D. 279 (1949), the Court exercised its discretion to make the ultimate determination of the jurisdictional facts in dispute; see *Gilbert* v. *David*, 235 U. S. 561 (1914); *Gibbs* v. *Buck*, 307 U. S. 66, 71-72 (1939), and requested counsel to submit affidavits to aid its de-

termination of the facts. On the basis of these affidavits, plaintiff's motions were denied and defendant's cross-motion for summary judgment against Yachim Holochuck granted because the evidence revealed that Yachim Holochuck was dead before the complaint in this action was filed, and therefore the Court had no alternative but to treat the complaint as a nullity as far as it related to Holochuck.

The attorneys for plaintiffs now move for leave to re-argue or, in the alternative, for an order pursuant to Rule 54(b), F.R.C.P., determining that there is no just reason for a delay and expressly directing the entry of final judgment dismissing the action purportedly instituted by Holochuck. Leave to re-argue is granted, but since the motion is limited to matters already considered carefully by the Court, the Court adheres to its original disposition denying leave to amend the complaint and to substitute parties plaintiff.

On the assumption that the statute of limitations of Pennsylvania, where the accident occurred, would bar her institution of a new lawsuit for wrongful death, the administratrix now urges that the earlier decision will work a harsh effect. Pennsylvania does not by statute extend the period within which a decedent's representative may institute suit, a measure adopted by some other states to safeguard the claims of persons who die during the period within which they might have brought an action for personal injuries. Even if Pennsylvania law governed however, we cannot indulge in the fiction that Yachim Holochuck was alive when this action was commenced in order to circumvent a state's policy in regard to time limitations for commencing an action. We are bound by the principle that "[i]f it be true that the statute of limitations would prevent the beginning of a new action . . . that fact cannot confer jurisdiction upon a court of

the United States . . .", *Gilbert* v. *David*, 235 U. S. 561, 568 (1914).

Moreover, this Court cannot assume that Pennsylvania's statute of limitations governs. In determining what law to apply in a diversity suit, a federal court looks to the conflicts law of the state in which it is located, *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U. S. 487 (1938), in this case New York, which follows the "grouping of contacts theory" to apply the law of the place having the most significant contacts with the matter in dispute. See *Kilberg* v. *Northeast Airlines*, 9 N. Y. 2d 34, 211 N.Y.S. 2d 133 (1961); *Babcock* v. *Jackson*, 12 N. Y. 2d 479, 240 N.Y.S. 2d 743 (1963). Although Holochuck's injuries allegedly arose out of an airplane crash in Pennsylvania, he was a domiciliary of Massachusetts, where the rights of persons who die during the period within which they might have brought an action for personal injuries are preserved by extending the time during which such a suit may be brought to two years from the execution of the personal representative's bond. Mass. G. L. 260 § 10. Furthermore, the flight on which the accident occurred originated, and was to end, in Connecticut. Thus there were significant contacts with states other than Pennsylvania, which conceivably would require application of the law of another state.

There being no just reason to delay and appeal from this Court's decision pursuant to Rule 54(b), F.R.C.P., final judgment may be entered in this action against plaintiff Yachim G. Holochuck.

s/ WALTER R. MANSFIELD
*U. S. D. J.*

Dated: November 13, 1968.